IN THE

Supreme Court of the United States

October Term, 1941

No. 24

SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

EDITH PAINTER, ADMINISTRATRIX OF THE ESTATE OF GEOFFREY L. PAINTER, DECEASED, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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STATEMENT.

The statement of respondent's brief (p. 2), while admitting that the statement contained in our brief is "not inaccurate in so far as it goes," asserts that our statement "has been so shortened as to omit many facts which we believe must be given consideration in order to arrive at a correct decision of this case."

Respondent, thereupon, sets out in her statement eleven pages of *minutiae* as to details of pleadings and procedural steps, both in the federal district court below and in the Tennessee equity suit, but which adds to the facts contained in petitioner's Statement nothing material to the questions of law upon which certiorari was granted.

The *minutiae* added by respondent have no significant bearing on the question whether the injunction issued by the Tennessee court was absolutely void for want of jurisdiction, the proposition which respondent must maintain as her major premise if she is to prevail, but could only have bearing on questions as to whether that injunction might be voidable for error in its scope and range. Obviously such questions could only be reviewed by a direct review of the Tennessee judgment, *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 89-90, and cases cited.

Respondent cannot prevail here by establishing that there was error in the Tennessee injunction decree. She made no appearance in the Tennessee suit. She made no effort to secure correction of the judgment if there was error in its scope or error in its substance. She made no effort to secure direct review of that judgment by appellate proceedings in the Tennessee courts and by certiorari here, as was done in No. 20, *Baltimore & Ohio R. Co.* v. *Kepner*.

The Tennessee injunction is *res judicata* and binding on respondent *unless* she can maintain the proposition, which indeed is the main premise of her argument, that the Tennessee equity court was absolutely without jurisdiction of the matter before it, so that its judgment was absolutely void, as distinguished from voidable or erroneous, and so that it could therefore be safely disregarded and her rights rested solely on a collateral attack upon it in the federal district court in Missouri.

While respondent does assert that the Tennessee decree was absolutely void for total lack of jurisdiction and makes that proposition the major premise of her argument, yet we think her argument falls far short of establishing that premise. And running *sparsim* throughout her brief are

subsidiary and supposedly supporting arguments which can bear only on questions of *errors* in the Tennessee judgment, which, if errors, could only give it a character voidable or reversible on a direct review, which respondent has not sought. Such questions are not before this Court. Such arguments are entirely wide of the mark of the case here raised.

Some of such arguments are: that some of the grounds for injunction alleged in petitioner's complaint in the Tennessee injunction suit, other than the ground of inequitable hardship and oppression, may have been unfounded (Respondent's brief, 21); that the Tennessee injunction may have been too highly restrictive in its scope (*Ibid.*, 21, footnote); and that it would have been almost as much hardship upon petitioner to have been sued by respondent in the federal court in the district of petitioner's residence (Richmond, Virginia) as in the district court below in the eastern district of Missouri (*Ibid.*, 22).

Similarly without any pertinence to the questions here raised is the argument of Point V, the last point of respondent's brief (pp. 69-72), based on the fact that respondent is now barred of recovery under the Liability Act in all jurisdictions, state and federal, except in the district court in Missouri below. We shall answer that argument in the last section of this reply and show that that situation is solely the result of the determination of respondent and her counsel to disregard the Tennessee suit and the failure of her counsel to protect her *pendente lite* by suit to toll the statutory limitation in one of the jurisdictions in which she was left by the Tennessee injunction entirely free to sue, a course directly opposite to that followed by counsel for respondent in the *Kepner case*.

ARGUMENT.

I.

Introductory.

Respondent's argument starts (brief, 15) with a confident assertion that there are no conflicting principles to be harmonized in arriving at the true rule to govern this case and that the controlling principles and their exceptions are well settled. The implication is that there is no conflict between the various decisions of this Court on questions of conflict between state and federal courts, from 1793, when the prototype of Section 265 of the Judicial Code was first enacted, down to date, and that the questions here raised are already decided and controlled by a uniform and harmonious line of historical decisions.

Unfortunately, or fortunately, such is not the nature of the judicial process or of the development of the law. With great respect be it said, there are conflicts between the earlier and later decisions of this court and many of those conflicts have not yet been reconciled. Precedents which have stood for nearly a hundred years and have been followed in hundreds of decisions (*Swift* v. *Tyson*, 16 Pet. 1) have been uprooted in a day (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64).

When respondent quotes and grounds her argument on the broad and strong language of the majority in *Riggs* v. *Johnson County*, 6 Wall. 166, 195-196, as she does on page 31 of her brief, we cannot overlook the fact that the whole basis of the philosophy and decision in that case, as in the other "county bond cases," *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Weber* v. *Lee County*, 6 Wall. 210, has now fallen under the impact of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. *Riggs* v. *Johnson County* stands in effect overruled. Whether any vitality remains in the dissertations which the majority there made on the rule of comity between state and federal courts is now of the highest dubiety.

The fact of the matter is that the precise questions presented in our case have never been decided by this Court.

The precise questions are not even presented in *Baltimore & Ohio R. Co.* v. *Kepner*, No. 20, although one question closely similar to one of our questions is there presented. The *Kepner case* does not involve a death action by a state appointed administrator, or the question of the power of the state of appointment to restrain such state officer from exporting a cause of action to another state. The *Kepner case* does not involve a collateral attack in the federal court on an injunction issued by the state court. It comes up by orderly, direct appeal. And finally it involves no questions of federal court injunction or of violation of Section 265 of the Judicial Code.

But when three circuit judges of the second circuit in *Bryant* v. *Atlantic Coast Line R. Co.*, 92 F. (2d) 569, decided the same questions raised in our case (minus the strengthening state administrator angle of the problem) directly contrary to respondent's contentions, and especially when four members of this Court of eight at the last term voted for reversal in the *Kepner Case*, 312 U. S. (Adv. No. 1)ii, thus necessarily believing the fundamental basis of respondent's argument to be erroneous, it is difficult to understand respondent's assertion that the questions raised in our case are settled and controlled by "a few well-settled principles, and the well-settled exceptions to those principles." (Brief, 15).

II.

The Liability Act, the Amendment of 1910 as to Venue, and the Legislative History of that Amendment Indicate no Congressional Purpose to Give Plaintiffs the Absolute and Unrestrainable Right to Shop Around to Find the Most Distant, Harrassing and Vexatious District in Which the Carrier is Doing Business or the One in Which Verdicts May Be Largest.

The references which respondent's brief makes (pp. 16-18) to statements during debate on the bill which became the amendment of 1910 to the Liability Act (Act of April 5, 1910, 36 Stat. 291) do not at all tend to support respondent's main premise, that the jurisdiction of a federal district court

of an action under the Act, once invoked and having attached, was intended by Congress to be, or is, absolutely exclusive of all jurisdiction of state courts, particularly of the courts of the state of the residence and appointment of a personal representative, to enjoin the further prosecution of such suit in such federal court by such personal representative. The quoted statements in debate have no reference to that proposition.

Nor do they in any way have bearing on the cognate question whether Congress intended by the 1910 amendment, or whether the amendment had the effect, to except from the operation of Section 265 of the Judicial Code every case in which the jurisdiction of a federal district court of an action under the Liability Act has been invoked and has attached, so as not only to *enable* the federal court in every such case, but indeed to *require* it, to protect its jurisdiction by injunction to stay any subsequent proceedings in state courts to restrain the party from further proceeding in the federal court. Respondent's case depends on establishing the affirmative of that proposition.

Indeed the whole tendency of everything quoted from the debates on the 1910 amendment is limited to showing the intention thereby to broaden the venues to which a plaintiff might resort in suing under the Act, so as to make it more convenient for the plaintiff to bring suit. There is no need to resort to debates to discover that intention. It is obvious from the amendment itself.

Section 6 of the Liability Act has been amended only three times. It may be well to trace its history.

As it stood in the original Second Federal Employers' Liability Act, the Act of April 22, 1908, 35 Stat. 65-66, section 6 merely provided:

> "That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

No express jurisdiction was conferred on either state or federal courts. There was no provision for concurrent

jurisdiction. There was no provision against removal. There was no venue provision. As to venue of actions in federal courts, that was left to be controlled by the general venue statute, which provided that a defendant could only be sued in the district of his residence, with the exception that if jurisdiction of the federal court was based solely on diversity of citizenship, the venue could be either in the district of the residence of the plaintiff (if the defendant could be found doing business there) or in the district of the residence of the defendant. Where the action was under the Liability Act jurisdiction of federal courts was not based solely on diversity of citizenship, hence such actions could not be maintained in the district of the residence of the plaintiff, even if the carrier was doing business there, unless that happened to be also the district of the residence of the defendant.

That act was a hardship on the plaintiff desiring to sue in the federal court. He could only sue in the district in which the railroad was chartered and that might be hundreds of miles away from the plaintiff's home.

The first amendment of section 6 of the Act was by the Act of April 5, 1910, 36 Stat. 291, which changed section 6 so as to read as follows:

> "That no action shall be maintained under this Act unless commended within two years from the day the cause of action accrued.
>
> "Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

By the same Act of 1910, there was added to the Liability Act a new section 9 which provided for the survival of

actions in case of death to the "personal representative" for the benefit of certain named beneficiaries. (45 U. S. C. 59).

By the Judiciary Act of March 3, 1911, ch. 231, sec. 291, 36 Stat. 1167, the words "circuit court" in section 6, as amended by the Act of 1910, were changed to "district court."

By the Act of August 11, 1939, ch. 685, sec. 2, 53 Stat. 1404, the limitation period for suit in section 6 was changed from two years to three years.

It is obvious upon its face, and without the necessity of resort to debates on the floor of Congress, that the amendment of 1910 to section 6 of the Act had the following purposes:

1. To broaden the available venue for suits in the federal courts, so as to make it more convenient for plaintiffs to sue and get service;

2. To make it clear that the federal courts did not have exclusive jurisdiction of actions under the Act (as some courts had erroneously supposed under the original Act) but that their jurisdiction was only "concurrent" with that of "the courts of the several States";

3. And to express a congressional preference for the jurisdiction of the state courts by forbidding the removal to the federal courts of any case under the Act brought in "any State court."

Since the original Act, read in conjunction with the general venue statute, although authorizing suit in the federal court in the district of the residence of the *defendant*, did not authorize like suit in the district of the residence of the *plaintiff*, and hence since plaintiff could not bring suit in the federal court in the district of his own residence *even if the defendant railroad did business in that district*, it seems obvious that the real purpose of the amendment in enlarging venue was to enable the plaintiff to sue the carrier

in the federal court in the district of plaintiff's own residence, if the carrier was doing business in that district, or, if it was not doing business in plaintiff's district, then to enable plaintiff to sue in some convenient nearby district in which the carrier was doing business, or in the district of the residence of the carrier or where the cause of action arose, if that be more convenient to the plaintiff.

It is still true, under the section as at present written and after all amendments, that there is no authorization in terms for the suit to be brought in the district "of the residence of the plaintiff" and the only way a plaintiff can resort to the federal court in the district of his residence is under the provision for suit in *the* district "in which the defendant shall be doing business at the time of commencing such action" if the carrier be doing business in plaintiff's district.

But while the venue amendment was adopted to enable the plaintiff to sue in a convenient federal district in which the carrier is doing business, so that the plaintiff need not go to a great distance to obtain service and take his witnesses a great distance for the trial, yet there is nothing in the amendment or in the legislative history to indicate that it was any part of the congressional purpose not merely to contribute to the convenience of the plaintiff but to punish the carrier or to put in the hands of plaintiff the powerful instrument of harassment and vexation of having an absolute and uncontrollable election to drag the carrier for trial to *any* most distant district in which it might be doing business, most distant from the district of the residence of the plaintiff as well as from that of the residence of the carrier and most distant from the district in which the cause of action arose or in which the witnesses lived.

Nothing indicates any congressional purpose to enable plaintiffs to convert the shield of protection and convenience into a sword of harassment, vexation and oppression, by shopping around at their uncontrollable pleasure to find the most distant federal district in which the carrier is doing business, or even the district in which by reason of purely

local conditions, wholly unrelated to the Act's purpose to give a uniform federal remedy, juries are in a habit of giving the largest verdicts

No such purpose is disclosed by the statements in debate quoted by respondent. Such purpose is negatived by the fact that Congress did not use the word "any," was careful not to give the provisions even the appearance of authorization to the plaintiff to shop around at his unrestricted discretion to select "any" of the many districts in which a large railroad might be doing business and which might be more favorable for large recoveries than the others.

Any such purpose is negatived by all the quotations respondent makes from the debates. It is negatived by the message of President Taft of January 7, 1910, urging the passage of the amendment (Congressional Record No. 45, Part 4, p. 4041). The President said:

> "The question has arisen in the operation of the interstate commerce employers' liability act as to whether suit can be brought against the employer company in any place other than that of its home office. The right to bring the suit under this act should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws. Bills for both the foregoing purposes have been considered by the House of Representatives, and have been passed, and are now before the Interstate Commerce Committee of the Senate. I earnestly urge that they be enacted into law."

And such purpose is also negatived by the report of the Senate Committee on Judiciary submitted by Senator Borah (Ibid., p. 4040) where it was said:

> "This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant.'

"This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was issued. This may be at a place in a distant State from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned.

"The extreme difficulty, if not impossibility, of a poor man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances.

* * * * * * *

"No argument is necessary to convince that this is a grave injustice to the plaintiff.

"Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a Federal court on a right based on the law of the United States.

"But to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting this case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist."

There is an insinuation contained in a statement on page 26 of respondent's brief which we are quite willing to bring into the open and meet frankly and head-on. It is there said by respondent that "there seems ample reason to assume that there is some good reason from the standpoint of petitioner railway, which will result in a *profit* to it and in a corresponding *loss* to this petitioner (*sic*, meaning respondent) and the dependents of her decedent, for its strenuous effort to prevent the trial of respondent's action under the act in the district court in Missouri, and, instead, to have the trial of that action held in the limited areas of Tennessee or North Carolina prescribed by the Tennessee state court's injunction." (Italics and matter in parentheses ours.)

There is a good reason for petitioner's efforts. It is this. No proper purpose of the convenience of plaintiff-respondent in obtaining service on petitioner railroad and in securing trial in a federal district convenient to the place of her

residence, within the congressional purposes of the Amendment of 1910, is served by respondent's resort to the distant district in Missouri. That district is inconvenient to respondent as well as to petitioner, far more inconvenient than the district in Tennessee in which she resides or the district in North Carolina in which the cause of action arose. Only one or both of two possible reasons could have been the motivating reason for her selection of the distant venue in Missouri: (1) convenience of or advantage to her Missouri counsel and inconvenience and hardship to petitioner railroad; or (2) that it is believed that juries in Missouri, by reason of local conditions in that state, remote from respondent's residence, will give larger verdicts than would juries in North Carolina or in Tennessee.

Neither of those reasons is within the congressional purposes. This was clearly in the mind of Mr. Justice Brandeis when he said in his dissent in *New York Central R. Co.* v. *Winfield*, 244 U. S. 147, at 168-169:

> "We are admonished also by another weighty consideration not to impute to Congress the will to deny to the States this power. The subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents, according to whether they reside in one or the other of our States and Territories, so widely extended. In a large majority of instances they reside in the State in which the accident occurs. Though the principal that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between States, in the amount and method of compensation, the periods in which payment shall be made, and the methods and means by which the funds shall be raised and distributed. The field of compensation for injuries appears to be one in which uniformity is *not* desirable, or at least not essential to the public welfare."

We think the question might be better addressed to respondent: why is it that she, a resident of Tennessee, a state appointed administratrix in Tennessee, whose intestate was killed just over the State line in North Carolina, the place of residence and appointment and the place where the death occurred being right in the middle of petitioner's railroad through the southeast, where there are good courts, state and federal, and good lawyers to vindicate her rights, so persistently refuses to litigate in the very section where she lives and where service of summons and trial is most convenient and where all the witnesses live, but goes to the far, trans-Mississippi state of Missouri to sue entirely outside her own and petitioner's southeastern territory?

The only answer is that given by the equity court in Tennessee, her purpose is to impose hardship on petitioner and to get some advantage over it which she does not conceive she can accomplish in her own territory, in the state or federal courts in Tennessee or North Carolina.

It is not within "those considerations which are persuasive of the statutory purpose" that the Liability Act intended to promote such purposes.

III.

The Well Settled Rule Whereby Courts of a State Will Enjoin Its Residents from Inequitable Resort to Suits in Other Jurisdictions Must Have Been Known to Congress When it Passed the Amendment of 1910. It Should Not be Held to Have Intended to Nullify that Rule as to Actions Under the Liability Act, in the Absence of Any Expression or Indication of Such Intention.

When Congress passed the 1910 amendment to the Liability Act it must have been familiar with the well recognized power of courts of the several states to restrain their respective citizens from inequitable resort to the courts of other jurisdictions on transitory causes of action. It must have been familiar with the line of cases represented by *Cole*

v. *Cunningham*, 133 U. S. 107, and *Dehon* v. *Foster*, 4 Allen (Mass.) 545, and the other cases cited on page 16 of our main brief.

This being so, if Congress, by the passage of the 1910 amendment to the Liability Act, had intended to take cases brought under the Liability Act out of that generally recognized rule, or to take away from the courts of the several states the power, which otherwise plainly exists, to enjoin their respective residents on equitable grounds from exporting such actions to other jurisdictions, we should expect in the Liability Act some expression of such intention.

Nothing in the Act expresses such intention. Nothing in the purposes of the Act or in its legislative history evidences such intention. Nothing in the considerations which are persuasive of the statutory purpose leads to the conclusion that Congress intended in any such fashion to trench on state power.

Under the principles of *Sinnot* v. *Davenport*, 22 How. 227, 243; *Reid* v. *Colorado*, 187 U. S. 137, 148; and *Maurer* v. *Hamilton*, 309 U. S. 598, 614; we do not believe that the Liability Act can be construed to have taken away that state power.

IV.

The Decisions Are Abundant Holding that the Courts of the State of Residence of the Plaintiff Have the Power to Enjoin Inequitable Exportation of Causes of Action Under the Liability Act to Courts of Distant States. No Reasons Exist Why the Same Power Should Not Exist to Prevent Exportation to Federal District Courts in Distant States. In Either Case the Distant Court Has Jurisdiction Under the Act of Congress.

The court below in its opinion (R. 82-83), on authority of *Ex Parte Crandall*, 53 F. (2d) 969, recognized that courts of the state of residence of the plaintiff have the power to enjoin exportation of suits under the Act to state courts of other states, on grounds of equity. It said:

"The railway company contends that the jurisdiction which the Congress conferred on the federal courts to try actions brought under the Federal Employers' Liability Act is subject to a qualification which must be implied, that Congress intended that any suit prosecuted under the Act in a state other than that of plaintiff's domicile might be halted by a court of the domicile, if it should appear that the suit prosecuted under the Act was oppressive and brought to secure an inequitable advantage from misuse of the Act's provisions for choice of venue. Such a qualification has been implied, but only to the extent that Congress conferred the privilege of bringing suits under the Act in state courts. In *Ex Parte Crandall*, 53 F. 2d 969, the Circuit Court of Appeals for the Seventh Circuit indicated that the qualification existed and held that habeas corpus should not be granted to an Indiana citizen who violated an injunction of an Indiana court forbidding her to litigate an action brought under the Federal Employers' Liability Act in a state court of Missouri. * * *"

The court below also recognized (R. 81) that the same holding was made in *Louisville & Nashville R. Co.* v. *Ragon*, 172 Tenn. 593, 113 S. W. (2d) 743; *Reed's Administratrix* v. *L. C. R. Co.*, 182 Ky. 455, 206 S. W. 794; *Chi., M. & St. P. R. Co.* v. *McGinley*, 175 Wis. 565, 185 N. W. 218; *N. Y. C. & St. L. R. Co.* v. *Matzinger*, 136 Oh. St. 271, 25 N. E. (2d) 349; *N. Y. C. & St. L. R. Co.* v. *Nortoni*, 331 Mo. 764, 55 S. W. (2d) 272, in each of which cases injunctions by the courts of the state of the residence of plaintiff restraining the plaintiff from prosecuting an action under the Employers' Liability Act in the courts of another state were held valid.

The situation was sharply presented in *N. Y. C. & St. L. R. Co.* v. *Nortoni*, *supra*. There death occurred in Indiana. The deceased was a citizen and resident of Indiana, as was his widow. The widow was appointed administratrix by Indiana courts She undertook to export her cause of action to Missouri and to sue under the Federal Employers' Liability Act in the Missouri state courts. The railroad secured an injunction in the Indiana court against her prosecution of the action in Missouri. She disregarded the Indiana in-

junction and prosecuted her Missouri suit to judgment. The railroad then moved the Indiana court for a contempt citation against her, which was issued. She then moved the Missouri court and obtained its injunction enjoining the railroad from prosecuting the Indiana contempt citation. The railroad then petitioned the Missouri Supreme Court for a writ of prohibition to prohibit the Missouri circuit court from enforcing its injunction against the railroad and from entertaining jurisdiction of the injunction. The Missouri Supreme Court recognized the power of the court of Indiana, the state of residence and appointment of the administratrix, to enjoin her from exporting her suit to Missouri and from maintaining it there. It made a provisional writ of prohibition absolute. It said (55 S. W. 2d at 273):

> "It is settled law that, in a proper case, a court of equity having jurisdiction of the person may enjoin such person from prosecuting a suit in a foreign jurisdiction. By a 'proper case' we mean that the party seeking such an injunction must make a clear showing that it would be inequitable, unfair, and unjust to permit the prosecution of the suit in a foreign jurisdiction. • • • "

We think the opinion below approved this rule whereby the courts of a state can enjoin a resident on equitable grounds from prosecuting an action under the Federal Employers' Liability Act in the courts of another state. We think respondent (brief, bottom 33-34) implicitly admits the rule. The court below held and respondent contends that the rule is different where the suit in the distant state is brought in a federal district court instead of in a state court.

The theory is that there is some peculiar virtue in the jurisdiction which a federal district court exercises under an act of Congress which makes it sacrosanct, different from the jurisdiction which a state court exercises under an act of Congress.

We do not perceive the basis of the distinction. Where a state court takes a case under the Liability Act it is acting pursuant to a jurisdiction given by act of Congress just as

much as is a federal court. "Lower federal courts are not superior to state courts." *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 90.

There is the distinction, of course, that state courts are creatures of state sovereignty while federal courts are creatures of federal sovereignty. But that distinction, we think, does not go to the point now argued.

While Congress has not attempted to compel states to provide courts for the enforcement of the Liability Act, but has only empowered them to do so, so far as the authority of the United States is concerned, *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230, 233, *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387, yet where the state has provided courts having general jurisdiction over liability cases, the Federal Constitution and the Liability Act require that such state courts must entertain jurisdiction of Liability Act cases and they cannot, even under a state policy, refuse to exercise such jurisdiction, because to so refuse would be to discriminate against rights arising under federal laws. *McKnett* v. *St. Louis & S. F. Ry. Co.*, *supra*, at 233-234.

Congress could have conferred exclusive jurisdiction on the federal courts, and the state courts would then have had no jurisdiction, regardless of state constitutions and laws. Congress has not done so, but has conferred concurrent jurisdiction on state and federal courts and the state courts, under federal law, cannot refuse the jurisdiction if the state has created apt courts for similar liability cases. And in the exercise of that jurisdiction the substantive federal law is controlling on the state courts, regardless of conflicts with state laws.

So it is seen that the jurisdiction of state courts under the Act is conferred by act of Congress in just as real a sense as is the jurisdiction of the federal district courts.

Now if the mere fact that a court has jurisdiction under an act of Congress and that that jurisdiction has been invoked in a pending suit is sufficient to make that jurisdiction exclusive of all power of any other courts, not only to interfere directly with the process and proceedings of that

court, but even to impose *in personam* restraint on a party to that suit, and to authorize that court to issue a counter-injunction, then no reason is perceived why the jurisdiction of state courts under the Act is not just as exclusive of all forms of interference by other courts as is the jurisdiction of federal courts. Both courts, state and federal, are given their jurisdiction by act of Congress.

Where a plaintiff has brought an action in a state court under the Liability Act he is acting in the prosecution of a federal right just as much as is a plaintiff bringing such an action in a federal district court. Just why the latter should be held to be wholly free from the power of his state of residence to restrain him, while the former remains subject to such power, we are unable to see.

V.

To Affirm the Court Below this Court Would Have Virtually to Repeal Section 265 of the Judicial Code by Judicial Construction, by so Expanding Judicial Exceptions to it as to Make the Exceptions Virtually Co-Extensive with the Rule.

Respondent on brief (pp. 18-19) strongly invokes the rule that the courts have no responsibility for the justice or wisdom of legislation, that their duty is to enforce a plain and unambiguous statutory provision regardless of any hardship which such construction may impose.

The application which respondent makes of those rules is curious. Her brief asserts (p. 18), "In direct and simple language the Congress by this provision of the Act gave the plaintiff in an action under the Federal Employers' Liability Act the right to institute and maintain an action in the federal court *of any* district in which the defendant was doing business at the time the action was commenced." (Italics ours.)

The italicized words "of any" do not appear in the statutory provision. In order to give the provision the "direct and simple" meaning attributed to it respondent actually

has to read into the statutory language words which Congress did not write in it.

Then it is asserted (brief, p. 19) that "For the courts to create ambiguity and implied qualifications in the clear and unequivocal language of this provision of the Act, so as to make plaintiff's right of selection of the forum in which to bring his action dependent upon matters of inconvenience, expense, or burdensomeness to the defendant, would be to amend that provision of the Act by judicial construction, rather than to interpret it."

Of course, language in a statute is not clear and unequivocal within the meaning of the rule of construction invoked by respondent when, in order to give the statute the meaning she asserts it to have, respondent is forced to read into it words which Congress did not write into it.

But respondent overlooks the fact that Section 265 of the Judicial Code is likewise an act of Congress and one of the oldest we have in the books, that its language is as clear and unambiguous as the English language can be, and that to restrict it as respondent's theory of the law would require it to be restricted, the Court would have to engraft upon it by judicial construction a broad exception, far broader than any heretofore engrafted upon it, and so broad as to be virtually co-extensive with the prohibition.

If respondent's argument is sound, then Section 265 does not mean what its plain language says but it must be construed as if it read:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy, *and except that in any case in which the jurisdiction of a court of the United States has first attached then such court shall have full power by injunction to stay any subsequent proceeding in any state court which may conflict or interfere with the exercise of the jurisdiction of said court of the United States or which may have for its purpose the restraint of a party from further proceeding in said case in said court of the United States.*

The italicized language or its substantial and effective equivalent, and all of it, must be read into Section 265, to make it accommodate the theory of the law presented by respondent's brief and by the opinion of the court below.

Certainly this Court has never yet written into Section 265 any such broad exception as that. If it does now, it will have to make entirely new law, entirely without precedent, when Congress has not seen fit to add any new exception to the prohibition of the Act of 1793 since it wrote into it the express bankruptcy exception in 1873 (Section 720 of the Revised Statutes), except that in the Interpleader Act and perhaps other acts it has authorized a particular injunction which, of course, does not fall within the prohibition of Section 265. *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 74.

The theory of the court below, and it was a theory necessary to its decision, and the theory of respondent's brief here, and it is a theory necessary to sustain respondent's position here, is just that above stated in the italicized exception which would have to be read into Section 265. It is that wherever jurisdiction of a federal court has first attached, then it is the absolute right and duty of such court to proceed to judgment, that it has no discretion to refuse to exercise jurisdiction or to yield it up in favor of another jurisdiction, and that in any such case it has not only full authority but the duty to protect its jurisdiction by injunction to stay proceedings in state courts, not only where such proceedings directly interfere with the jurisdiction, proceedings or process of the federal court, but also where they merely restrain a party from further proceeding in the federal court, and this without regard to any distinction between conflict *in rem* or *quasi in rem* and conflict only *in personam*, and in spite of Section 265

But lower federal courts are not created by the Constitution. They are statutory courts and courts of limited jurisdiction, with only the jurisdiction which Congress has prescribed. *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 376.

It follows that no lower federal court can ever act in any case *except where it has jurisdiction conferred upon it by act of Congress.* If the existence of jurisdiction under an act of Congress in a lower federal court *ipso facto* takes away from state courts all power to restrain parties to the federal suit and takes the case out of Section 265, so that the federal court can issue counter-injunctions to stay parties from injunction proceedings in state courts, then virtually every case in which a federal court can act at all is excepted from the prohibition of Section 265 and the exception becomes coextensive with the prohibition. If this be the law, the prohibition is a dead letter, in spite of its nearly 150 years of supposed life.

To be strictly accurate we should say that the theory of the court below and the theory of the respondent here apparently is limited, although we think its implications are not necessarily so limited, to the exclusiveness of federal court jurisdiction against any form of state court interference, either with the federal court itself or with the parties, *where jurisdiction of the federal court has been invoked and has attached prior to the invoking of state court jurisdiction.*

If this be the limit of the theory, and if it be here approved as law, then Section 265 can have no application in any case except to prohibit a federal court from granting injunction to stay proceedings in any court of a State where the proceeding in the state court was started before the proceeding in the federal court.

If that beautifully simple test be sound, then many difficult decisions of this Court over the 150 years under Section 265, and much of the learning over which the Court has labored, amount to futile tilting at windmills. All such cases should have been disposed of by applying the simple test whether the federal proceeding started first or whether the state court proceeding started first. If the former, then the prohibition of Section 265 does not apply. If the latter, the prohibition may apply.

It seems a pity that the Court had not discovered such an easy and magic formula back as far as *Diggs and Keith* v. *Wolcott*, 4 Cranch 179 (1807). That case, by the way, is a model for brevity of opinion. It was there said:

> "The case was argued upon its merits by C. Lee and Swann for the appellants, and by P. B. Key, for the appellee; but *the court* being of opinion that a circuit court of the United States had not jurisdiction to enjoin proceedings in a *state* court,
>
> "Reversed the decree."

If respondent's view of the law be sound, all subsequent decisions under Section 265 might readily have been disposed of by opinions of equal terseness.

VI.

To Affirm the Court Below, this Court Must Reject the Distinction Between Conflict In Rem or Quasi In Rem and Conflict Only In Personam, so Carefully Elaborated in Kline v. Burke Construction Co., Repeatedly Reaffirmed by Recent Decisions, and Recognized by Congress in Recent Legislation.

We recognize that, as often stated by this Court, Section 265 of the Judicial Code must be read in connection with Section 262. But, so reading them, we cannot avoid seeing that while Section 262 is a grant of power to the federal district courts to issue writs of *scire facias* and "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," yet Section 265 is an express and direct limitation upon Section 262 and Section 262 cannot be construed to whittle down and attenuate the limitation imposed on it by Section 265, because it is upon Section 262 that the very prohibition of Section 265 is a limitation. It would be lifting by bootstraps to construe the grant in diminution of the express restriction on, and exception to, the grant.

So we come back to the ingenious formula which the court below discovered for resolving all the complicated questions of conflict between courts and of rules of comity. It has the same illusory, mathematical exactness as the magic formula which, in the next preceding point of this brief, we suggested as the necessary result of respondent's argument.

"The balance between Sections 262 and 265 of the Judicial Code," said the court below, "lies at the point where one court interferes with the other. Neither state nor federal court has jurisdiction to enjoin the other except where one interferes with the province of the other, then the court interfered with has the exclusive jurisdiction to prevent the interference." (R. 91).

That is a pretty formula and would seem just as practicable and workable as the formula suggested, in our next preceding point above, as the necessary result of respondent's argument. Indeed it is a kind of paraphrase of that formula. One trouble about it is, however, that it needs definition of its terms. Just when does one court interfere with the other? Unless we know the answer, we cannot prick out the line between Sections 262 and 265, in spite of the apparent neatness of the formula of the court below. When does one court "interfere with the province of the other"? Unless we know, the formula still is meaningless.

And this necessarily throws us back to the distinction which this Court has uniformly drawn: that a state court does not interfere with a federal court where the action in each court is purely *in personam*; that the one court does not "interfere with the province of the other" where the action in each court is purely *in personam*, a suit against or a restraint solely upon the person or party, not directly against the other court or its process or proceeding; but that the one court interferes with the other, or with the other's province, only where there is an attempted direct interference with the process or proceeding in the other court or with a *res* or an action *quasi in rem* in the possession of the other court.

Thus a proceeding in a state court which is purely *in personam*, which makes no attempt directly to interfere with the process or proceeding in the federal court, and which makes no attempt to assume jurisdiction over a *thing* over which the federal court has already acquired jurisdiction *in rem* or *quasi in rem*, but only attempts to impinge upon a person or party, is not, according to this Court's decisions, an interference with the federal court or with its province, is not within the rule of comity authorizing the federal court to protect its first acquired jurisdiction by injunction, is not within any judicial exception which has been engrafted on the prohibition of Section 265.

It is not a distinction which we have invented. It is this Court's distinction, upon which it has spent laborious hours in opinions both before and since *Kline* v. *Burke Construction Co.*, 260 U. S. 226. The court below leapt over the distinction by saying that the Tennessee injunction suit directed solely to the person of respondent was not really an *in personam* action within the meaning of the rule of comity (R. 91) and respondent says of the distinction in effect that by referring to it we seek to read into the authorities a limitation on the exceptions to Section 265 which does not appear therein. (Brief, 63).

Let us look for a moment at the authorities. The distinction in question runs through them like a golden thread.

Diggs and Keith v. *Wolcott*, 4 Cranch 179 (1807), although it did not expressly refer to the Act of 1793, recognized no exception to its principle.

Peck v. *Jenness*, 7 How. 612 (1849), applied the prohibition in a bankruptcy matter, that being prior to the adoption of the express bankruptcy exception.

Orton v. *Smith*, 18 How. 263 (1856), applied the prohibition of the Act of 1793, without mentioning the Act, to forbid a federal court bill of peace to quiet title to land the title to which was in litigation in state courts. That would have been conflict *quasi in rem*.

Watson v. *Jones*, 13 Wall. 679 (1872), involved conflict quasi *in rem*, but where state court jurisdiction had first attached, and denied the federal court the injunction power, by reason of the prohibition of the Act of 1793.

Haines v. *Carpenter*, 91 U. S. 254 (1876), and *Dial* v. *Reynolds*, 96 U. S. 340 (1878), applied the prohibition of the Act of 1793 without recognizing any exceptions to the prohibition, except the express bankruptcy exception. In each of those cases conflict between courts was quasi *in rem* but in each the state court jurisdiction had first attached.

Moran v. *Sturges*, 154 U. S. 256 (1894), upon general language in which respondent strongly relies, did authorize federal injunction against state court interference, but there the state court was attempting to get possession of boats which the federal court had in its possession by libel in admiralty. The interference was plainly *in rem* and direct and the broad language of the opinion must be read in the light of that fact. It was plainly within the exception to the prohibition of Section 265 which we recognize and upon which we rely.

In the case of *In re Chetwood*, 165 U. S. 443 (1897), this Court applied the prohibition of the Act of 1793 where the federal court was attempting to interfere with an *in personam* proceeding in the state court but where the state court was not attempting to interfere with any *res* in the possession of the federal court.

In *White* v. *Schloerb*, 178 U. S. 542 (1900), federal injunction was sustained to prevent a state court from interfering with property in possession of a bankrupt under adjudication and for whom a referee had been appointed. This was *in rem* conflict and was also within the express bankruptcy exception to the prohibition of R. S. 720.

But in *Metcalf* v. *Barker*, 187 U. S. 165, and in *Pickens* v. *Roy*, 187 U. S. 177, both decided December 1, 1902, it was held that even in case of bankruptcy, but where the state courts had acquired jurisdiction *in rem* of the property prior

to the bankruptcy, the rule of comity between courts, as well as the prohibition of R. S. 720, (now Judicial Code Section 265) prevented federal injunction to interfere with the prior *in rem* jurisdiction of the state court.

In *Julian* v. *Central Trust Co.*, 193 U. S. 93 (1904), federal injunction was authorized to prevent state courts from interfering with title and possession of a purchaser under a federal court decree in a proceeding *in rem*. The federal court was merely protecting its *in rem* jurisdiction and the title of the purchaser under its final decree. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273 (1906), was a case of like character.

Looney v. *Eastern Texas R. R. Co.*, 247 U. S. 214 (1918), on the broad language in which respondent strongly relies in our case, must be read in the light of the facts before the court. There the federal court had first acquired jurisdiction and had enjoined the state Attorney General from instituting suits against carriers for penalties for complying with an order of the Interstate Commerce Commission. The Attorney General started state court suits in contempt of the federal injunction. The federal court issued a further injunction to restrain further violation and this Court affirmed.

Wells Fargo & Co. v. *Taylor*, 254 U. S. 175 (1920), a case upon whose general language respondent very strongly relies, seems to us wholly out of harmony with *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, and we think it is now obsolete, destroyed by the erosion of time. In its ultimate effect it held that a federal district court had power, in spite of Section 265, to enjoin a party from collecting on a final judgment of a state court, on the federal court's holding that it would be contrary to general principles of equity and good conscience for him to exercise his legal rights under the state court judgment, a matter with which federal courts have no concern whatsoever since the *Erie Case*. We cannot regard generalities in its opinion as expressing sound law now.

In *Essanay Film Co.* v. *Kane*, 258 U. S. 358 (1922), it was held that suit in a federal court to enjoin defendant from further prosecuting a suit against the plaintiff in a state court, upon the ground that service of process in the state court was void as denying due process, is forbidden by Section 265. It distinguished *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, on the ground that there the state court had proceeded to final judgment, but "without intimating that in other respects the cases are parallel."

In *Kline* v. *Burke Construction Co.*, 260 U. S. 226 (1922), this Court gave the leading exposition of the distinction between *in personam* actions in state and federal courts, where there is no direct conflict and where federal injunctions are forbidden by Section 265, and actions *in rem* or *quasi in rem* in the two courts involving the same *res*, where there is direct conflict and interference so as to come within the judicial exceptions to Section 265.

Lion Bonding Co. v. *Karatz*, 262 U. S. 77 (1923), carefully elaborated and reaffirmed the same distinction. It further forbade collateral attack in a federal court on a judgment of a state court, as also did *Wagner Co.* v. *Lyndon*, 262 U. S. 226 (1923), which case further seems to us to be in direct conflict with *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, and to have in effect overruled it *sub silentio*.

In *Oklahoma* v. *Texas*, 265 U. S. 490 (1924), an original suit, this Court enjoined the plaintiff in a state court from suing a receiver appointed by this Court. Such suit would have interfered with this Court's *in rem* jurisdiction within the meaning of the distinction in *Kline* v. *Burke Construction Co.*, hence was not forbidden by Section 265.

In *Riehle* v. *Margolies*, 279 U. S. 218 (1929), it was held that even the appointment by the federal court of a receiver on a creditor's bill gives the federal court no right to stay a suit against the debtor in the state court to fix on him a liability *in personam*, that such state court suit was no interference with the federal court, that the judgment ren-

dered by the state court, even though taken by default, was *res judicata* and could not be collaterally attacked in the federal receivership. It reaffirmed *Kline* v. *Burke Construction Co.*

In *Munroe* v. *Raphael*, 288 U. S. 485 (1933), the federal court had jurisdiction *in rem*. It was held that federal court injunction to protect the *res* against state court interference was within the recognized exception to the prohibition of Section 265.

Penn Co. v. *Pennsylvania*, 294 U. S. 189 (1935) was a case in which the jurisdiction in *rem* of the federal court had first attached and the state court undertook to get possession of the *res*. Both courts enjoined. Section 265 was not involved directly because there was a direct review of the state court's judgment, no attempt at collateral attack upon it. This Court reaffirmed the distinction made in *Kline* v. *Burke Construction Co.* between suits *in personam* in the two courts, where there is no conflict, and suits *in rem* or *quasi in rem* where there is direct conflict. It held that, since the federal court had first acquired jurisdiction *in rem*, the state court was without power to interfere with the *res*. The plain implication was that if the federal jurisdiction had been merely *in personam* then the state court would not have been prevented from interfering. And even in that case this Court gave effect to the "doctrine of abstention" upon which we rely in our main brief (pp. 35-39) and suggested to the federal district court that it renounce its jurisdiction in favor of the state court.

Hill v. *Martin*, 296 U. S. 393, 403 (1935), held that the prohibition of Section 265 is comprehensive; that it includes all steps in the judicial process and is independent of the doctrine of *res judicata;* that it applies whatever the nature of the proceeding, unless the case presents facts which bring it within one of the recognized exceptions.

Princess Lida v. *Thompson*, 305 U. S. 456, 465-467 (1939), reaffirmed the *in rem* distinction drawn in *Kline* v. *Burke*

Construction Co., and re-affirmed in *Penn Co.* v. *Pennsylvania.*

Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 274 (1941), where there was no conflict *in rem*, warned the federal district court that an injunction to stay parties from further proceeding in a state court was not authorized under Section 265.

In *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 190, this Court disapproved a contention of the party stated by the Court as follows:

> "What is contended is that historically federal courts have carved out a rule to protect themselves from interference by state courts, and that a plaintiff in a federal court proceeding has an absolute right to prosecute his suit and collect his judgment in that court—a right which would somehow be arrested or taken away by giving effect to the New York attachment."

That sounds exactly like respondent's basic contention in our case.

After this review of the authorities we do not think it necessary to argue that the distinction drawn in *Kline* v. *Burke Construction Co.* between proceedings *in personam* in state and federal courts, where there is no direct conflict and where the prohibition of Section 265 applies, and conflicting proceedings *in rem* or *quasi in rem*, where there is direct conflict and a federal court can enjoin the parties from proceeding in the state court, in spite of Section 265, is thoroughly grounded in the decisions, early and late.

We think it quite significant that when Congress, in the Interpleader Act, authorized a particular federal court injunction against proceedings in state courts which, of course, is not within the prohibition of Section 265, *Treinies* v. *Sunshine Min. Co.*, 308 U. S. 66, it carefully limited that injunction to enjoining suits "on account of the property" involved in the federal interpleader suit, that is, to protecting the *res* in the possession of the federal court. Thereby

we think Congress recognized the distinction we have been discussing, and put its approval on it.

In our case there was no conflict *in rem* or *quasi in rem*. To sustain the theory of the court below this Court will have to wipe out the well settled distinction.

We think it follows clearly from the authorities that the Tennessee injunction was not void and that the injunction issued by the federal district court below was erroneous and in violation of Section 265, as well as an incompetent collateral attack on the Tennessee judgment.

VII.

The Dilemma Which Respondent Sees in Our Position is Illusory and the Decisions of This Court Dispel the Illusion.

Respondent's counsel contend that our position puts us in a dilemma. We contend, they say, that the Tennessee injunction was not a direct interference with the federal district court in Missouri but was only a personal restraint on respondent, and hence was not in violation of the rule of comity between courts, but that we contend that the injunction issued by the federal district court in Missouri violated Section 265, although it did not run directly against the state court or its process or any *res* in its possession, but operated only against the party, petitioner.

That is our position. Our answer to respondent is that in taking that position we are not impaled on the horns of a dilemma but are following a distinction which this Court has clearly drawn in its opinions.

As we said on page 44 of our main brief, where the remedy of injunction is expressly denied by statute, as by Section 265, forbidding federal court injunctions to stay proceedings in state courts, it has been uniformly held that the fact that the injunction does not run directly against the state court or its process or any *res* in its possession, but only operates to restrain parties from proceeding further in the state courts, does not take the federal injunction

out of the prohibition of Section 265. That section clearly forbids federal courts from restraining parties from further proceeding in the state courts. See the thirteen cases cited on page 44 of our main brief, beginning with *Diggs* v. *Wolcott*, 4 Cranch 179, and ending with *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 274, in all of which federal injunctions merely to restrain parties from further proceeding in the state courts were held to be violative of Section 265.

But where there is no statutory prohibition of the writ of injunction, as where one federal district court enjoins parties from further proceeding in another federal district court, or where a state court merely enjoins a party from further proceeding in a federal court, in which cases the only prohibition against injunction is such as is implicit in a rule of comity between courts, then the distinction is well settled that the injunction merely against the party is not an interference with the other court. In such case the restraint of the party is not legally tantamount to the restraint of the court itself.

This was made abundantly clear in *Steelman* v. *All Continent Co.*, 301 U. S. 278, a case in the latter category, involving injunction by a federal district court to restrain parties from proceeding in another federal district court. In the unanimous opinion of this Court in that case the very argument made here by respondent was made. The Court said (290-291):

> "* * * The argument misconceives the grounds upon which the trustee looks to us for aid. The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdiction be taken in its strict and proper sense. Cf. *Straton* v. *New*, 283 U. S. 318, 321; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738. He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. *Isaacs* v. *Hobbs Tie & Timber Co., supra; Murphy* v. *John Hofman Co.*, 211

U. S. 562, 568, 569; *Moran* v. *Sturges*, 154 U. S. 256, 274. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. *Gage* v. *Riverside Trust Co.*, 86 Fed. 984, 998, 999; *Higgins* v. *California Prune & Apricot Growers*, 282 Fed. 550, 557; *Cole* v. *Cunningham*, 133 U. S. 107, 112, 117, 118. Suits as well as transfers may be the protective coverings of fraud. *Shapiro* v. *Wilgus*, 287 U. S. 348, 355. We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases. 2 Story, Eq. Jur., 14th ed., § 1195; 5 Pomeroy, Eq. Jur., § 2091; *Cole* v. *Cunningham, supra; Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245; *Kessler* v. *Eldred*, 206 U. S. 285; *Rickey Land & Cattle Co.* v. *Miller & Lux*, 218 U. S. 258; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 426; *Smith* v. *Apple*, 264 U. S. 274, 279. Cf. Judicial Code, § 265; 28 U. S. C. § 379; *Brown* v. *Pacific Mutual Life Ins. Co.*, 62 F. (2d) 711, 713; *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 69 F. (2d) 60, 61, 62."

The very fact that the court there drew the very distinction we have above drawn, and after citing with approval *Cole* v. *Cunningham*, 133 U. S. 107, and other cases down to *Smith* v. *Apple*, 264 U. S. 274, 279, then said "Cf. (compare) Judicial Code Section 265," shows that the Court was expressly distinguishing the cases under Section 265 from the *Steelman Case* and other cases of its class there cited.

In our case, as in the *Steelman Case*, we do not challenge the jurisdiction of the federal district court in Missouri "if the word jurisdiction is taken in its strict and proper sense"; we were not seeking in the Tennessee court "a writ of prohibition directed to the (district) court itself." What we were seeking, and secured, was "an injunction directed to a suitor, and not to any court, upon the ground that the

suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong." And, since in such case there is no statutory prohibition against injunction, the restraint of the party is not "legally tantamount to the restraint of the court itself."

VIII.

Even if the Court Should Hold Against Us and With Respondent on the Basic Questions Thus Far Argued, the Decision Below Must Be Reversed Because Respondent Has Misconceived Her Remedy. Her Proper Remedy Was a Direct Review of the Tennessee Judgment. The Collateral Attack on it in the District Court Below Was Incompetent.

Even if respondent is right in her basic position, that the mere fact that the federal district court in Missouri had jurisdiction first acquired, by the force of the rule of comity,* deprived the Tennessee equity court of *power* to enjoin respondent from further prosecuting her action in the federal district court in Missouri, still the denial of *power* is not a destruction of *jurisdiction*. If respondent is right so far, the Tennessee injunction was only erroneous for excess of power, not absolutely void for want of jurisdiction. If the substantive law is as respondent contends, then the Tennessee court, *in the exercise of existing jurisdiction*, should have refused the injunction prayed by petitioner on the ground that the prior existing jurisdiction of the federal court, under the Liability Act, deprived the Tennessee court of power to issue the injunction prayed.

This distinction is thoroughly settled by this Court's decisions under Section 265 itself.

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* Respondent quotes language from this Court to the effect that it is a rule of "necessity." If so, it is a rule of comity arising out of necessity. Nomenclature is unimportant. What is important is just what the rule is and just what are its limitations.

In *Smith* v. *Apple*, 264 U. S. 274, it was held that Section 265 is not a jurisdictional statute, that it neither confers nor denies jurisdiction, but is a mere limitation on the grant of the right to issue a particular equitable remedy.

Suit was there brought in a federal district court to enjoin the defendant from enforcing certain judgments he had obtained in a state court. The district judge dismissed the bill on the ground that the injunction sought was forbidden by Section 265. Plaintiff appealed direct to this Court. If the decision of the district court was on an issue of its *jurisdiction* direct appeal lay here, otherwise appeal lay only to the Circuit Court of Appeals.

This Court held that the dismissal on the ground that the court was prohibited by Section 265 from granting the relief sought by the bill did not involve an issue as to the jurisdiction of the court but was an exercise of existing jurisdiction and the equivalent of holding that the bill was without equity.

The same holding was made in *Woodmen of the World* v. *O'Neill*, 266 U. S. 292, 298.

It follows that even if the first acquired jurisdiction of the federal district court below deprived the Tennessee court of the power to issue the injunction which it issued, it did not deprive that court of jurisdiction. Its judgment was not absolutely void for want of jurisdiction. It could not be disobeyed or disregarded. It could not be attacked collaterally in the federal court. The only proper course was to seek a direct review of the Tennessee judgment. *Lion Bonding Co.* v. *Karatz*, 262 U. S 77, 89-90.

That was the course pursued in *Baltimore & Ohio* v. *Kepner*, No. 20 this term, and in several other cases presented at this term.

IX.

It is the Fault of Respondent's Counsel if She is now Barred in All Jurisdictions Save the District Court in Missouri Below.

Counsel for respondent use strong language to characterize a statement in our main brief. We had stated that the federal and state courts in Tennessee and in North Carolina remained open to respondent under the Tennessee court injunction to bring her liability action therein. Counsel for respondent characterize our statement (their brief, 70) as "simply, utterly false and without any foundation whatsoever."

Of course we were speaking of the times dealt with by the record and our statement was correct.

All that counsel for respondent mean by their strong language is that since the decision by the Circuit Court of Appeals below, since it granted stay of its mandate to allow petitioner to file petition for *certiorari* here, and, indeed, on the very day before our petition was filed here, the two year statutory limitation on the right to maintain the death action fell. As a result respondent is now barred from bringing a new suit in any jurisdiction other than the federal district court in Missouri in which sued. But that is not by reason of the restraint of the Tennessee injunction. She was left by that injunction entirely free to resort to state or federal courts in North Carolina or Tennessee.

The chronology is significant. The death occurred February 3, 1939 (R. 2, 3). Respondent filed her action in the district court in Missouri on August 31, 1939 (R. 2). The Tennessee injunction issued on May 27, 1940 (R. 35). Respondent filed her supplemental bill in the district court in Missouri on June 21, 1940 (R. 14). On July 10, 1940, the district court in Missouri issued its counter injunction (R. 53). Notice of appeal and supersedeas order were filed on July 10, 1940 (R. 54-55). The record was filed in the Court of Appeals for the 8th Circuit on July 29, 1940 (R. 67). The Court of Appeals affirmed the judgment of the District

Court on January 10, 1941 (R. 78). Within ten days thereafter we filed petition for stay of mandate to allow us time to file petition for *certiorari* here and the court below stayed the mandate on January 21, 1941 (R. 98).

During all that time the state and federal courts of North Carolina and Tennessee were open to respondent to sue petitioner under the Liability Act. It was not until February 3, 1941, that the two year period of bar under the Act expired.

The only reason why respondent is now barred by statutory time limit from suing in any other state or federal court than the federal district court in Missouri is that her counsel were so cock sure of their legal judgment on the important issues at bar in this Court as to gamble their client's rights under the Liability Act on their confident professional judgment. If they were right, well and good. If they were wrong, then the fault is not petitioner's.

In the *Kepner Case*, No. 20 this term, counsel for the injured employee Kepner were not so cocksure and took no such gamble with their client's rights. Even though the Ohio court in that case denied injunction to restrain Kepner from proceeding with his action in the federal district court in New York, conceiving that the Liability Act deprived it of power to do so, yet, pending direct appellate proceedings and *certiorari* proceedings here, counsel for Kepner protected their client's rights by bringing another action under the Liability Act in Ohio, the state of residence, so that he would not be barred if decision in this Court should go against him.

Counsel for respondent in our case would have been well advised if they had done the same thing.

The same comment is pertinent to the repeated complaining references by respondent's counsel to the fact that the Tennessee injunction was an *ex parte* injunction. An *ex parte* injunction of a state court, they say, undertook to stop respondent from exercising her federal rights in the district court in Missouri.

Of course, it was *ex parte*. It was an ordinary *ex parte* preliminary injunction, in the nature of a preliminary restraining order. But it was personally served on respondent. In ordinary course of equity practice she would be expected to appear and resist its continuance, set up her alleged federal right, move to set aside the injunction for want of power, or to modify or restrict its terms for error of law. If she had, then either there would have been no Tennessee injunction, or, if there had been one, it would not have been *ex parte*.

The only reason it is *ex parte* is that respondent refused to appear, chose to disregard the Tennessee equity suit, and rested her rights on a collateral attack on the Tennessee judgment in the federal district court in Missouri. We could not force her to appear in the Tennessee suit. It is respondent's fault if the Tennessee injunction remained *ex parte*.

CONCLUSION.

Upon all the foregoing, we submit that the decision below should be reversed.

Respectfully submitted,

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